No. 14885.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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JACK BROWN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## BRIEF OF APPELLEE.

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## BRIEF OF APPELLEE.

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### I.
### STATEMENT OF JURISDICTION.

A seventeen count indictment was filed against appellant on April 27, 1949, charging conspiracy, false representations within the jurisdiction of a federal agency and priorities violations in beginning construction and diverting materials.

Appellant entered a plea of *nolo contendere* to Counts Six, Seven and Eight, three misdemeanor counts in the indictment alleging violations of Section 633 of Title 40, Appendix, United States Code, and on November 16, 1949 the Honorable William C. Mathes of the United States District Court for the Southern District of California, sentenced appellant to imprisonment for one year and to pay a fine of $10,000.00 on one count, suspended

the imposition of sentence on the other two counts, and placed appellant on probation for five years after his release from custody, on condition that he pay a fine of $20,000.00 [Govt. Ex. 8, Judgment of Nov. 16, 1949]. By Judgment entered on August 26, 1955, the same Court revoked and terminated its prior probationary order, pursuant to Section 3653 of Title 18 of the United States Code, and sentenced appellant to two years imprisonment and to pay a fine of $20,000.00 [Govt. Ex. 8, Judgment of Aug. 26, 1955].

On August 31, 1955, appellant filed his Notice of Appeal to this Court from the Judgment of August 26, 1955, pursuant to Section 1291 of Title 28 of the United States Code [R. p. 2].

## II.
## STATEMENT OF THE FACTS.

During the era of intense shortage of housing and of building materiel which existed in this country in 1946, immediately subsequent to the cessation of hostilities in World War II, appellant engaged in an enormously large business involving the sale, principally to non-veterans, of prefabricated houses for cash. These houses contained materials obtained by appellant upon an H H priority, upon the fraudulent representation to the Government that the critical materials thus obtained would be incorporated into prefabricated houses and sold to veterans only [Govt. Ex. 8, especially Counts 6, 7 and 8 of the Indictment filed April 27, 1949, and Memorandum Regarding Profit from Federal Housing Administration Violations, filed October 5, 1949].

## III.
## STATEMENT OF THE CASE.

On April 27, 1949, appellant was indicted for alleged conspiracy, false representations within the jurisdiction of a federal agency and priorities violations in beginning construction and diverting materials.

Appellant entered a plea of *nolo contendere* to Counts Six, Seven and Eight of the indictment on September 8, 1949.

Count Six charged appellant with wilfully beginning construction of a prefabricated house although appellant knew such construction was not authorized under appropriate Veterans' Housing and Priority Regulations.

Counts Seven and Eight each charged appellant with wilfully selling to a non-veteran, a prefabricated house into which house were incorporated certain plumbing supplies and materials which appellant obtained by use of H H priority ratings.

On November 16, 1949, the Court committed appellant, on Count Six to the custody of the Attorney General for one year and imposed a fine of $10,000.00, with appellant to stand committed until the fine was paid. On Counts Seven and Eight, the Court suspended imposition of sentence and placed appellant on probation for a period of five years commencing upon his release from custody from the imprisonment imposed under Count Six. One of the conditions of probation was that during the probationary period, appellant "pay to the United States of America a fine of $20,000.00, such fine to be paid at such times and in such installments as the Probation Officer of this Court shall direct" [Govt. Ex. 8, Judgment of Nov. 16, 1949].

On January 13, 1950, the motion of appellant for reduction of sentence was denied [Tr. Jan. 13, 1950, p. 34, lines 16-25].

Appellant was released from prison on November 15, 1950.

By Order of December 12, 1951, filed December 13, 1951, the Court denied without prejudice the petition of appellant to terminate probation and to remit the fine.

A petition for revocation and termination of appellant's probation was filed on July 22, 1955 and after a one day hearing on August 22, 1955, the Court entered its judgment on August 26, 1955, revoking and terminating the probationary order and sentencing appellant to imprisonment for one year and a $10,000.00 fine on each of Counts Seven and Eight, to run consecutively, or a total imprisonment of two years and a $20,000.00 fine, appellant to stand committed until the fine be paid or he otherwise be discharged as provided by law [Govt. Ex. 8, Judgment of Aug. 26, 1955].

On August 31, 1955, appellant filed his Notice of Appeal to this Court from the Judgment of August 26, 1955 [Govt. Ex. 8].

On September 12, 1955, this Court heard and denied appellant's motion for bail pending appeal.

## IV.

## ARGUMENT.

### A. The Court Ordered Appellant to Pay to the United States of America, a Fine of $20,000.00 With Power in the Probation Department to State the Times and Installments. The Probation Department Directed Appellant Concerning Times of Payment and Installments.

The Court ordered appellant to "pay to the United States of America a fine of $20,000.00. . . ." The entire sum became due on the date of judgment on November 16, 1949 and appellant having wilfully failed to make payments on the fine during the period of probation while having the ability to pay, violated a condition of probation. Appellant cites no authority in support of his contention that the $20,000.00 fine did not become due immediately.

It was within the power of the Probation Department to ameliorate the requirement that all of the fine be paid immediately, by granting to appellant the grace of payment "at such times and in such installments" as the Probation Officer shall direct.

For the purpose of argument, we do not concede but will assume that the $20,000.00 fine would not have become due unless times of payment thereon and installments had been designated by the Probation Department. There was substantial direction to appellant by the Probation Department in this regard from 1950 until revocation of probation proceedings in 1955.

Probation officer Paul O. George [Tr. Aug. 22, 1955, p. 11, lines 13-15, incl.] discussed "the $20,000.00 fine" with appellant as early as November 20, 1950, and, "tried

to impress upon him the importance of making payments on the fine." [Govt. Ex. 7, typed on blue paper on the left side of said exhibit].

According to appellant's own testimony, every time appellant saw Probation Officer Smith, Officer Smith told appellant that if appellant could make some payment he should do so, that whenever he had any money, he should make regular payments of the fine, however, small they may be.

The specific testimony is as follows:

> "Q. (By Counsel for Appellant): There is a reference in one of the reports, I believe by Mr. Smith, that on one of your office visits there was discussion about your trying to make some regular payments, however small they may be. Do you recall a discussion of that kind? A. Yes. [Tr. Aug. 22, 1955, p. 48, lines 5-10, incl.].
>
> Q. (By Counsel for the Government): When was this conversation that occurred between yourself and Mr. Smith during which it was said that if you could make some payment you should make some payment? When did that conversation occur? Can you recall the year? A. I think every time I saw Mr. Smith he referred to that. I saw him a few times.
>
> Q. Has that been since 1952? A. I can't say the exact year or month it was, but I saw him a few times, and he said whenever I had any money to make some payment on it."

The Probation File, Government's Exhibit 7, typed on the left side thereof on blue paper, indicates that Probation Officer Smith consulted with appellant on twelve different occasions, including twice in 1953, and that

other probation officers consulted with appellant during the period of probation.

Chief Probation Officer Calvin H. Meador testified:

> ". . . There was never any definite amount set for Mr. Brown to pay. The reason no definite amount was set is that on each occasion a representative of the probation office or I myself talked with Mr. Brown concerning the fine. He was highly insistent that he had nothing with which to pay and, as a result, we merely instructed him to make payments regularly by the month as — — in as great an amount as possible." [Tr. Aug. 22, 1955, p. 9, lines 13-20, incl.]

Appellant himself, testified that he understood the payments should be made in the sum of "at least a hundred dollars":

> "A. Well, Mr. Smith said that if I could make some payment to reduce the fine I should do it, but there was no apecific (specific) amount involved as to $5 or a dollar or $10. I thought that would be an insult to the government on a $30,000 fine to come up with a dollar or $5. He just said if I have any, make any money, have any money, I should bring up some money towards the fine. *I figured the lowest I could bring up against a fine of that kind would be at least a hundred dollars,* not a dollar or five dollars." (Emphasis added.) [Tr. Aug. 22, 1955, p. 48, lines 13-21, incl.].

The Probation Department directed appellant to make monthly payments on the fine in as great an amount as possible; to make regular payments on the fine, however small they may be. The "times" specified in the order were "monthly"; the "installments" were most liberal,

*i. e.,* anything the appellant could pay "in as great an amount as possible," which was purportedly understood by appellant to mean $100 or more.

### B. Appellant Was Financially Able to Pay and Wilfully Failed to Make Payments on the Fine.

In the monthly probation reports made by appellant to the Probation Department, appellant stated his income to be $1000 for the month preceeding the Report dated January 4, 1952 [Govt. Ex. 7 and Tr. Aug. 22, 1955, p. 13, line 18 and p. 14, lines 8-11, incl.] and $500 monthly for the next four months [Govt. Ex. 7 and Tr. Aug. 22, 1955, p. 15]. None of this income was paid toward the fine and at least $440.79 was not applied toward necessities of life, as follows:

The March 1, 1952 probation report indicates appellant paid $143 to the Metropolitan Life Insurance Company, the April 10, 1952 report indicates $140 was paid for life insurance and the May 3, 1952 report indicates $157.79 was paid to Metropolitan Life Insurance Company.

Appellant had borrowed $5,000.00 on his life insurance policies seven or eight years ago [Tr. Aug. 22, 1955, p. 55, lines 23-25 incl., p. 56, line 1].

Since that time to the date of revocation of his probation, he paid $300 a year, at six per cent interest on the insurance loan, without fail [Tr. Aug. 22, 1955, p. 56, lines 2-14 incl.] and $320 a year as premiums on the policies [Tr. Aug. 22, 1955, p. 57, lines 3-5 incl.] or a total yearly payment to the insurance company of $620 every year that appellant was on probation. It is submitted that appellant could have paid on the fine to the

Government, the entire sum of approximately three thousand dollars which he paid to the insurance company during the almost five years he was on probation, or could have paid to the Government "at least a hundred dollars" which appellant alleges was his understanding of the minimal acceptable payment on the fine. Instead, appellant chose to pay the insurance company and thereby plan to leave an estate and at the same time evade payment of the fine.

After the aforesaid employment, appellant was employed by the National Cabinet Company for a period and then, for almost two years, from approximately August or September of 1953 to the date of revocation of probation, appellant was steadily employed for an alleged sum of only $200 per month by the National Furniture Company which company is allegedly owned solely by the wife of appellant. With a steady modest income every month for two years, it is not reasonable to believe that appellant or anyone would be unable to pay something on the fine.

Appellant's income as reported by him to the Probation Department was $200 per month. According to appellant's own witness, Ralph O. Buntin, Public Accountant for the National Furniture Company, as stated in the third paragraph of the first page of his affidavit [App. Ex. B]:

> ". . . all personal expenses such as medical, insurance, insurance loan payments, house payments, and similar items pertaining to both Jack Brown and Esther Brown are paid by the National Furniture Company and charged to Mrs. Brown's personal drawing account;"

As all of the personal expenses of appellant were paid by the National Furniture Company, appellant's actual income was greater than reported and some or all of the appellant's reported $200.00 per month earnings from employment could easily have been applied on the fine.

Page three of appellant's Exhibit B is a balance sheet for the National Furniture Company. The bottom of the page contains a condensed statement of profit and loss for the 12 months ended December 31, 1954. Net sales were in excess of $42,000; gross profit and other income total $19,027.51. Expenses are stated to total $17,803.90 and include salaries, interest, taxes, rent, advertising, other expenses and depreciation. The largest item is "Other Expenses" which is $6,170.83. These "Other Expenses" are, of course, the personal expenses of appellant and his wife such as house payments, which are paid by the National Furniture Company as the business expense discussed *supra*. In addition to the payment of appellant's personal expenses by the National Furniture Company, salaries were paid by the company in the total sum of $6,042.60 which is stated to include $2,600.00 to Jack Brown. According to appellant, the only help they have in the place is a nineteen year old boy who does the delivery for them [Tr. Aug. 22, 1955, p. 44, lines 20-22 incl.] The difference between $2,600.00 and $6,042.00, the sum of $3,442.60, must be the salary paid to the delivery boy for 1954. If the probation reports state the only income to appellant, the incongruous conclusion would be reached that appellant with his managerial background and years of experience [Govt. Ex. 8 and Affidavits of appellant therein] managed the business allegedly owned by his wife for less than the salary paid to the nineteen year old delivery boy.

Upon the apparently warranted assumption that; (1) most of the $6,170.83 of "Other Expenses" was used to pay the personal expenses of appellant and his wife, (2) that appellant also received a $2,600 salary, and (3) the alleged net profit to appellant's wife was $1,223.61, appellant and his wife received an income in the vicinity of almost ten thousand dollars for the year 1954.

During the probationary period, appellant also received $7,500.00 from his three children and returned $500.00 to one child who needed it.

Appellant had the financial ability to have paid something on the fine since June 20, 1951.

### C. Appellant Stated He Did Not Intend to Pay the Fine, and Did in Fact Never Intend to Pay the Fine.

Probation Department Officer Stanley Algots testified that on July 14, 1955, the appellant stated to Algots that he, appellant, was not going to pay the fine because he was unwilling to pay it. Excerpts of the pertinent testimony of Mr. Algots are as follows:

Mr. Algot:

> "I asked him what was going to be done about the fine and *Mr. Brown told me that he was not going to pay the fine, and then he went on again about the treatment he had received.*" [Tr. Aug. 22, 1955, p. 26, lines 13-16 incl.] (Emphasis added.)
>
> "*Later on he went on to me that he had no money or no assets* with which to do it, that the Government couldn't collect." [Tr. Aug. 22, 1955, p. 26, lines 18-21 incl.] (Emphasis added.)
>
> "*Following the statement* that he was not going to pay the fine, he went into another story slightly

sidetracked on how, *what a tough deal he had received all along the line. Then* he told me that it would be impossible for the government to collect the money from him in that he had nothing. . . ." [Tr. Aug. 22, 1955, p. 27, lines 15-20]. (Emphasis added.)

"The Court: Do you intend to convey to us that he said he wasn't going to pay it because he was unwilling to pay it, is that what you intend to convey to us?

The Witness: Yes, sir.

The Court: That is what you understood him to say?

The Witness: That is what I understood him to say." [Tr. Aug. 22, 1955, p. 30, lines 8-13.]

Appellant did not pay any portion of the fine voluntarily. He believed that he was being persecuted. He informed the Court that there were others worse than he who had not been prosecuted. This is the reason for appellant's wilful failure to pay on the fine. He simply decided that his term of imprisonment was more than sufficient punishment for the offense and that he would make no voluntary payment on the fine.

Appellant commenced his probationary period on November 15, 1950. No payment was made on the fine until June 20, 1951, at which time he paid $1,500 on the fine. This was the only payment ever made on the entire fine of $30,000.00 and was made by appellant to obtain a release of the Government's lien against the joint tenancy property of appellant and his wife. Appellant contended the property, which had an acquisition cost of $23,000.00, was the separate property of his wife, not subject to the fine. He paid the $1,500 so that upon a sale of the prop-

erty he would avoid loss of the proceeds therefrom to satisfy the Government lien. It was not unreasonable for the Government to release its lien where several years remained for payment on the balance of the fine.

The admitted income of appellant, $1,000 one month, $500 many months and $200 a large portion of the probationary period enabled appellant to have paid on the fine if he intended and wanted to pay on the fine.

At all times appellant paid his insurance company $620.00 per year, yet at no time did he make any payment on the fine except the one payment made to obtain a release of lien.

If appellant intended to pay on the fine he could have evidenced it by regular payments or intermittent payments on the fine, instead of paying $620.00 every year to his insurance company with the certainty that no portion of the payments or prospective pecuniary benefits to be derived would be applied on the fine and add to his "persecution."

To avoid the necessity of a second purported metamorphosis from apparent joint tenancy property into alleged separate property of his wife, appellant did not share in the record ownership of the National Furniture Company. He managed it instead. This further evidences his intention to avoid payment of the fine by avoiding acquisition of property which would be subject to the fine.

Appellant stated he did not intend to pay the fine. His failure to pay on the fine speaks more clearly than his words that his intention was to never pay anything on the fine if he could avoid it.

## D. The Trial Court Acted Within Its Discretion in Revoking Appellant's Probation.

Appellant's Opening Brief on page 43 prior to the "Conclusion," with reference to the revocation proceedings, states in part:

> ". . . defendant cannot be found guilty, . . ."

It is respectfully submitted that defendant was not found guilty in the revocation of probation proceedings. A hearing on a charge of probation violation is in the nature of a summary proceeding, and is not a "criminal prosecution."

> *United States v. Hollien,* 105 F. Supp. 987 (D.C., Mich., 1952).

The only question on appeal from an order revoking probation is whether there has been an abuse of discretion. A breach of good faith is sufficient to warrant revocation of probation.

> *Burns v. United States,* 287 U. S. 216, 222.

The Court did not abuse its discretion in revoking the probation of appellant Jack Brown.

Every time appellant complained vehemently of his alleged "persecution" he evidenced his lack of good faith. Having the ability to make payments, he evidenced his intention to disobey the order of Court by wilfully refusing and failing to pay anything on the fine, although repeatedly requested to do so. Appellant has never had a good faith intention to attempt to comply with the terms of probation by payment of any portion of the fine. The test is not whether or not the penalty was harsh but whether appellant in good faith attempted to comply with

the order of Court. Appellant arbitrarily decided that his term of imprisonment was more of a sentence than he had anticipated by entering a plea of *nolo contendere* and that he would pay no part of the fine, except to release the lien, although he at all times had the ability to pay on the fine. Not even one small payment clouds the window through which we clearly perceive his attitude concerning payment of the fine and his patent lack of good faith with the Court.

Appellant states on page 37 of his opening brief that he had no intimation that he was not living up to the terms of probation until it was substantially over. No notice is required, but every written and oral communication between appellant and the Government reminded appellant of the fine, his failure to pay anything on it, and directed appellant to make payments on the fine.

The Court properly revoked probation where defendant was arrears in making monthly payments on the fine.

> *Parks v. United States,* 46 F. 2d 461 (C. C. A. Pa. 1931).

Appellant acted in bad faith and wilfully failed to pay monthly on the fine as directed, while having the ability to do so. The Court did not abuse its discretion in revoking probation.

### E. The Letters to Appellant From the United States Attorney Were Properly Admitted.

Chief Probation Officer Calvin H. Meador testified that the letters [Govt. Exs. 1-6 incl.] were sent to appellant on behalf of the Probation Department [Tr. Aug. 22, 1955, p. 6, lines 20-22 incl., p. 7, line 4]. The Probation Office and the United States Attorney "cooperated" in

the collection of the fines [Tr. Aug. 22, 1955, p. 8, lines 24-25; p. 9, line 1]. Of course the United States Attorney is not authorized to fix the terms and conditions of probation. The letters were properly admitted into evidence. Appellant responded to the letters by consulting personally with members of the staff of the United States Attorney concerning the fine. Yet, despite having the financial ability to pay on the fine and despite the repeated requests of the various Probation Officers who interviewed appellant repeatedly during the probationary period directing that some monthly payment be made in some amount, appellant wilfully failed to make payments on the fine.

Appellant showed a lack of good faith by falsely informing the United States Attorney when discussing the fine in response to the letters, that he, appellant, did not have the ability to pay on the fine [Tr. Aug. 22, 1955, p. 47].

If the letters were not properly admissible to show appellant's lack of good faith or for a related reason, the admission of the letters was harmless error.

## V.
## CONCLUSION.

Appellant did not attempt in good faith to comply with the conditions of probation.

The Court ordered him to pay a fine to the United States. For nearly five years appellant was interviewed periodically, nineteen times in all, by probation officers who directed appellant to pay installments in whatever sum he was able to pay every month on the fine. The six letters from the United States Attorney on behalf of the

probation officer, directed that small regular monthly payments be made on the fine in as large an amount as appellant could pay. Appellant also discussed payment of the fine with the United States Attorney subsequent to receipt of each letter. Yet appellant would have this Court believe that he was never directed as to times and installments for payment of the fine. Appellant now alleges the technical defense that he did not know and the Probation Department did not tell him when and how much he should pay on the fine. Although appellant was in fact directed by the Probation Department as to times (monthly) and installments (as much as he could pay or "at least one hundred dollars"), the test is not whether he was so directed but whether he acted in good faith. If appellant entertained any doubt concerning the monthly sum which the Government would have accepted in payment on the fine he showed his lack of a good faith intention to pay the fine by failing to ask if $5 or $10 would be an acceptable monthly payment. Most creditors would be insulted more by a total failure of the debtor to pay, than by a small good faith payment. This is especially true where, as here, no interest accrues on the debt.

In any event, appellant testified that he understood the payments should be made in the sum of "at least one hundred dollars." At all times during the period of probation, appellant paid $620 yearly to his insurance company which sum or a hundred dollars or more thereof he had the financial ability to have applied on the fine as well as other monies within his control, discussed *supra*. Appellant having wilfully failed to make payments on the fine during the probationary period cannot now be heard to complain of a revocaton of his probation. Similarly, when appellant entered a *nolo contendere* plea to three of

the misdemeanor counts in the indictment, he knew what the maximum penalty might be and should not now and should not, from at least as early as the time he had served his first year of imprisonment, be heard to complain of alleged "persecution" by the Court for having received the maximum punishment prescribed by law.

Appellant contends that the maximum fine and imprisonment appear to have been imposed, and inferentially, that probation was revoked, "solely because the Court below, contrary to the evidence and representations of counsel for both the Government and appellant, believes that appellant has large amounts of concealed assets." The United States Attorney does not agree as suggested, that appellant has no assets hidden away, nor does the United States Attorney request that the fine or term of imprisonment be reduced.

It is the belief of the Court, of the Honorable William C. Mathes, that appellant engaged in an enormous illegal cash prefabricated building business during the post war critical housing shortage, and that appellant's protestations of poverty, since the incipient stages of the criminal proceedings, defies belief. The Court believes that appellant has the ability to pay the entire fine at any time from resources well concealed by appellant [Tr. Aug. 22, 1955, p. 89, lines 3-14; Tr. Sept. 12, 1955, p. 19, lines 1-16].

Revocation of probation was not based on appellant's wilful failure to pay the entire fine. Probation was revoked because the Court found that appellant "wilfully failed to make *any* payment since June 20, 1951, on the fine imposed as a condition of probation, and that defendant has at all times had the ability so to do." [Govt. Ex. 8, Judgment of Aug. 26, 1955].

Irrespective of whether appellant has or does not have the present ability to pay the entire fine, appellant wilfully failed to pay on the fine since June 20, 1951. He had the financial ability to make monthly payments in the sums of five or ten dollars, or an occasional payment in the sum of one hundred dollars, and wilfully failed to make any payment since 1951.

The grant or favor of probation which the Court had accorded appellant was properly revoked.

The Court did not abuse its discretion in revoking the probation of appellant and should be affirmed by this Court on appeal.

Respectfully submitted,

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